THE SUPREME COURT OF IOWA

NO. 20-0575
Black Hawk County No. EQCV139257

THE IOWA ASSOCIATION OF BUSINESS AND INDUSTRY.

PLAINTIFF/APPELLANT,

VS.

THE CITY OF WATERLOO, THE WATERLOO COMMISSION ON HUMAN RIGHTS & MARTIN M. PETERSON, IN HIS OFFICIAL CAPACITY,

RESPONDENTS/APPELLEES.

APPEAL FROM THE DISTRICT COURT
OF BLACK HAWK COUNTY

THE HONORABLE JOHN BAUERCAMPER JUDGE

BRIEF OF AMICUS CURIAE NAACP

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Regulation Of Job Advertisements and Applications In Subparagraph 15(B)(1) of the Waterloo Ordinance, and Regulation of Contract Formation in Subparagraphs 15(B)(2)-(4), Do Not Constitute Regulation Of "Terms & Conditions Of Employment" and Thus Do Not Fall Within the Reach of Iowa Code section 364.3(12)

AUTHORITIES

Cupps v. S & J Tube, 927 N.W.2d 204 (Iowa. Ct. App. 2019)

Estate of Ryan v. Heritage Trail Assoc., 745 N.W.2d 724 (Iowa 2008)

Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989)

Haskenhoff v. Homeland Energy Solutions, LL.C, 897 N.W.2d 553 (Iowa 2017)

Heartland Express, Inc. v. Terry, 631 N.W.2d 260 (Iowa 2001)

Hishon v. King & Spalding. 467 U.S. 69 (1984)

Patterson v. McClean Credit, 491 U.S. 164 (1989)

Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851 (8th Cir. 2001)

STATUTES & RULES

42 U.S.C. § 1981

42 U.S.C. § 2000e-2

Iowa Code § 216.19

Iowa Code § 364.3(12)

PL 102–166, November 21, 1991, 105 Stat. 1071

Iowa R. App. P. 6.904(3)(m)

OTHER

Corbin on Contracts § 2.3 111

Zimmer, Sullivan, and White, Cases and Materials on Employment Discrimination, § C. Employment Terms, Conditions, Privileges of Employment, and Employment Practices 63 (8th Ed. 2013)

II. Should There Be Any Doubt as to the Construction of Iowa Code section 364.3(12)(a) That Amicus Propose in Part I, the Doctrine of Constitutional Avoidance Counsels the Court to Construe Statutes to Avoid Constitutional Issues When Possible.

AUTHORITIES

State v. Dahl, 874 N.W.2d 348 (Iowa 2016)

State v. Ramos, 149 N.W.2d 862 (Iowa 1967)

STATUTES

Iowa Code § 216.19

III. The Overwhelming Evidence of the Disparate Racial Impact of Employer Practices that Exclude Persons Who Have a Criminal Record from Consideration Provided a Proper Basis for the City to Exercise Its Authority pursuant to Iowa Code section 216.19 of the Iowa Civil Rights Act to Enact Ordinance 5522.

AUTHORITIES

Baker v. City of Iowa City, 750 N.W.2d 93 (Iowa 2008)

Canada v. Texas Mut. Ins. Co., 766 F. App'x 74 (5th Cir. 2019)

EEOC v. Freeman, 961 F. Supp. 2d 783 (D. Md. 2013)

Griggs v. Duke Power, 401 U.S. 424 (1971)

Hazelwood School Dist. v. United States, 433 U.S. 299 (1977)

Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512 (Iowa 1990)

Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)

Pippen v. State, 854 N.W.2d 1 (Iowa 2014)

Petro v. Palmer College of Chiropractic, No. 18-2201, 2020 WL 3524842 (Iowa Sup. Ct. June 30, 2020)

Wards Cove Packing Co. v. Atonio, 490 US. 642 (1989)

STATUTES

Iowa Code § 216.19

PL 102–166, November 21, 1991, 105 Stat 1071

OTHER

Harold Lewis, Jr., Civil Rights and Employment Discrimination Law 267 (West 1997)

Successfully Interviewing Guide, p. 8 (Iowa Workforce Development 2011) available online at: https://www.iowaworkforcedevelopment.gov/sites/search.iowaworkforcedevelopment.gov/files/Successful%20 Interviewing%20Guide70-0006.pdf

INTEREST OF AMICUS STATEMENT

The NAACP is the country's largest and oldest civil rights organization. Founded in 1909, it is a non-profit corporation chartered by the State of New York. The Iowa-Nebraska Conference of the NAACP is the state affiliate of the NAACP and includes the Black Hawk County Branch. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, to advocate and fight for social justice, and to eliminate racial hatred and racial discrimination.

Among the major goals of the Iowa-Nebraska NAACP is criminal justice reform that addresses widely recognized and decried racial disparities in stops, arrests, prosecution, and incarceration. Painfully aware of the disparity between Black unemployment and White unemployment, and of the impact of a criminal record on opportunities for employment, the Iowa-Nebraska NAACP also has had for years as one of its major goals ensuring African Americans a fair chance for employment through legislation at either the state or local level "Banning the Box."

Such legislation prohibits inquiry into or consideration of criminal history until the interview stage or the making of a conditional

offer. It does not prohibit background checks or inquiry into criminal history; it only defers it. An employer may quite properly inquire into the existence of a criminal record at the interview or following a conditional offer to learn what an applicant was convicted of, whether it relates to job qualifications, how long ago it occurred, the applicant's acceptance of responsibility, and what the applicant has done in the meantime. To enable that, of course, is the point of the Ordinance rather than discourage one from applying or precluding one from getting an interview. And it does not require any employer to make an offer to anyone; it just gives an applicant with a criminal record the chance to explain and demonstrate that he or she is well qualified for the employment opportunity at hand.

The Waterloo Ordinance that has been challenged in this case seeks to ameliorate pre-employment practices that have had a substantial adverse effect on all persons who have a criminal record, but, because of the racial disproportionalities in the Iowa criminal justice system, the practices have had a particularly adverse effect on African Americans. The Iowa-Nebraska NAACP is keenly interested in seeing Waterloo's authority to enact such an ordinance upheld, and

therefore seeks leave to appear as Amicus Curiae and file a brief in support of the Appellee City of Waterloo.

ARGUMENT

I. Regulation Of Job Advertisements and Applications In Subparagraph 15(B)(1) of the Waterloo Ordinance, and Regulation of Contract Formation in Subparagraphs 15(B)(2)-(4), Do Not Constitute Regulation Of "Terms & Conditions Of Employment" and Thus Do Not Fall Within the Reach of Iowa Code section 364.3(12).

A. SUMMARY: The City succinctly sets forth its response to the Iowa Association of Business and Industry's [hereinafter "ABI"] preemption argument in its Summary of the Argument:

> There is nothing in Iowa Code § 324(12) which expressly preempts Ordinance 5522. Indeed, as the District Court correctly concluded, the Ordinance is specifically authorized by Iowa Code § 219.19(1) which allows cities to enact ordinances restricting broader or different categories of discriminatory practices.

Appellees Br. p. 23. As will be developed in this Section, the NAACP believes the argument that "[t]here is nothing in Iowa Code § 324(12) which expressly preempts Ordinance 5522" is dispositive of this case. This warrants a careful look at text and precedent. *Id.*

In attacking the limitations on a business' pre-employment conduct imposed by the Ordinance 5522, ABI disregards the first step in the analysis. ABI argues about whether the ordinance conflicts with or

exceeds federal and state law. That is the second, and dependent, step in analysis. The first step is whether the ordinance even regulates terms and conditions of employment to begin with. Subparagraph 15(B)(1) of Ordinance 5522 does not, because it is addressed to pre-employment activities. Subparagraphs 15(B)(2)-(4) do not, because they are addressed only to a *refusal* to enter into the employment contract. This means the Ordinance is not affected by Iowa Code section 364.3(12).

Iowa Code section 364.3(12) states that an ordinance may not "provid[e] for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law . . . ." Iowa Code § 364.3(12)(a). Subparagraph 15(B)(1) of the Ordinance is directed only to pre-employment conduct such as presenting applicants with a form to use, advertising, and investigating. All such conduct precedes the existence of the employment contract, and therefore cannot be terms and conditions of employment. A close look at the phrase "terms and conditions of employment," and precedent discussing it, establishes that this phrase is meant to refer to what happens *after* the employment contract is formed. Since the regulation of *pre-employment* advertising and *pre-employment* application procedures is temporally and substantively different from regulation of the "terms and conditions of

employment," Iowa Code section 364.3(12) does not apply to Ordinance subparagraph 15(B)(1).

Hiring decisions, which are regulated by the remaining three paragraphs of the Ordinance, relate to formation of the employment contract, not to the terms and conditions of that contract. After all, an employer violates paragraphs 2, 3 and 4 of Ordinance 5522 [hereinafter "Ordinance"] only by *not* hiring the applicant in question. Since the hiring decision is "adverse," there is no hiring. This means no employment contract will ever result from conduct which violates the Ordinance. In consequence, there is no contract whose terms and conditions the Ordinance would regulate. What is regulated is contract formation, not the terms and conditions of a contract after formation. Thus, Iowa Code §364.3(12) also does not apply to Ordinance subparagraphs 15(B)(2)-(4).

B. Only Ordinances Relating To Terms And Conditions Of Employment Are Regulated: Analysis must commence with the words of the statute. "When the statute's language is plain and its meaning is clear, [the courts] look no further. . . . [Courts] resort to the rules of statutory construction only when the terms of [a] statute are ambiguous." *Estate of Ryan v. Heritage Trail Assoc.*, 745 N.W.2d 724,

730 (Iowa 2008). This means that "[i]n construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Iowa R. App. P. 6.904(3)(m). Here is what the legislature said:

> A city shall not adopt, enforce, or otherwise administer *an ordinance*, motion, resolution, or amendment *providing for any terms or conditions of employment* that exceed or conflict with the requirements of federal or state law relating to a minimum or living wage rate, any form of employment leave, hiring practices, employment benefits, scheduling practices, or other terms or conditions of employment.

Iowa Code § 364.3(12)(a) (emphasis added). The subject of this sentence is "city," the verb is "shall not adopt, enforce, or otherwise administer," and the predicate is what follows, namely, "an ordinance, motion, resolution, or amendment." The complete predicate of the sentence, however, contains a narrowing clause, namely, "an ordinance, motion, resolution, or amendment *providing for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law relating to . . . terms or conditions of employment.*" *Id.* (Emphasis added).

For section 364.3(12) to apply, Ordinance 5522 must provide "terms and conditions of employment" that exceed or conflict with federal or state law. The examples given in section 364.3(12)—minimum

or living wage rate, any form of leave, hiring practices, employment benefits, scheduling practices—make clear that the terms the Legislature had in mind and was codifying are ones coming into play *after* an offer of employment has been made and accepted. Inclusion of "hiring practices" in this list only refers to and governs those which by virtue of application become part of the employment contract *once it is formed,* i.e., once an offer is made by an employer and accepted by the applicant. *E.g., Cupps v. S & J Tube,* 927 N.W.2d 204 (Iowa. Ct. App. 2019) (where job application set forth arbitration agreement that would be included in an offer if made, and offer was made and accepted, the arbitration agreement was incorporated into and became an enforceable term of employment contract).

The adjective phrase starting with "that exceed or conflict with" refers to its nearest antecedent, namely, "terms and conditions of employment" *provided by the Ordinance.* But if the Ordinance does not provide for "terms and conditions of employment," one never gets to the point of asking whether those terms and conditions are forbidden. And to repeat, the Ordinance does not provide for terms and conditions of employment but instead only regulates pre-employment forms and activity.

C. ORDINANCE SUBPARAGRAPH 15(B)(1) DOES NOT REGULATE TERMS & CONDITIONS OF EMPLOYMENT AND THUS IS NOT COVERED BY IOWA CODE SECTION 364.3(12). Employment is a contract. Under elementary contract principles a contract requires an offer, acceptance of the offer, and adequate consideration. *See generally Fogel v. Trustees of Iowa College,* 446 N.W.2d 451, 455-56 (Iowa 1989). Advertisements that positions are open are not offers of employment. If they were, anyone could just show up at the job site, say "I accept," and become an employee. Similarly, even a filled-out job application is not an offer. It is but a solicitation of an offer. For example, in *Heartland Express, Inc. v. Terry,* the employee argued that he was hired in Iowa when he was told that his application for employment was accepted. 631 N.W. 2d 260 (Iowa 2001). The Court found, as a matter of law, that the application "was nothing more than a solicitation or invitation of an offer by Terry to Heartland that he work for Heartland." *Id.* at 269. Moreover, *Heartland Express* cited authority for the general rule that "an application for employment is not a contract; it is a mere solicitation of an offer of employment." *Id.* (citing *Harden v. Maybelline Sales Corp.,* 230 Cal.App.3d 1550, 1555 (1991)); *see also* Corbin on Contracts § 2.3 111 ("Request for an offer is not an offer.").

And the contents of an application form or web page that job seekers might choose to fill out is not even a solicitation of an offer.

Both offer and acceptance are required to create a contract of employment. Making an offer of employment is one step removed from employment; soliciting an offer by filling out an application is two steps removed; presenting applicants with a blank form to use for soliciting offers is three steps removed; and advertising that jobs are open so as to encourage job seekers to fill out the form and apply is four steps removed. None of these creates a contract, and with no employment contract having been formed, necessarily no terms and conditions of a contract are provided. Regulation of what happens before there is an employment contract, which the Ordinance does do, does not constitute regulation of the terms and conditions of employment, which assumes an offer has been made and accepted. Regulation of *pre-employment* advertisement and application procedures is not regulation of, *does not provide,* any terms and conditions of employment—a condition of section 364.3(12) being applicable. Because Ordinance subparagraph 15(B)(1) only regulates *pre-employment* conduct, section 364.3(12) does not apply to it.

D. SUBPARAGRAPHS 15(B)(2)-(4) OF THE WATERLOO ORDINANCE REGULATE CONTRACT FORMATION, NOT TERMS AND CONDITIONS OF EMPLOYMENT, AND THUS ARE ALSO NOT COVERED BY IOWA CODE SECTION 364.3(12). Very similar logic establishes that Ordinance paragraphs 15(B)(2)-(4) do not "provide for terms and conditions of employment" and so are also beyond the scope of section 364.3(12). These Ordinance subparagraphs provide that an employer may not make an "adverse hiring decision" based on arrests, based on expunged records, or based on the "applicant's" criminal record without "a legitimate business reason." What is regulated are the factors that can be considered when deciding whether to offer employment to an applicant. Until the offer is made *and* accepted there is no employment contract, and thus no terms and conditions of the employment contract itself. *If* the Ordinance made it illegal to discharge a worker for getting arrested, *then* it would be prohibiting Waterloo employers from having as a term and condition of employment that its employees maintain a clean arrest record. But this is not what the Ordinance does. Adverse post-employment actions like terminations, harassment, failure-to-promote, unequal pay, unequal discipline, and the like are not regulated by the Ordinance. The Ordinance simply does not "provide for" terms and conditions of

employment; it "provides for" permissible considerations in the formation of an employment contract. These are two different things. Only the latter can have terms and conditions prohibited by section 364.3(12).

Consideration of other code provisions and of precedent highlight the divide between contract formation and the terms and conditions of the formed contract. The words "terms, conditions, or privileges of employment" are terms of art, clearly drawn from the principal provisions in Title VII, section 703. Section 703 of Title VII provides:

> It shall be an unlawful employment practice for an employer-(1) *to fail or refuse to hire* or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (emphasis added) [hereinafter "Title VII"]. Notably, an entirely different section, 704(b), prohibits employers from discriminating in advertising a job opening. If actions taking place before contract formation, such as advertising, were encompassed by the prohibition against discrimination in "terms and conditions or privileges of employment," then there would be no need for a separate advertising section. Clearly, the framers of Title VII understood that even a broad

prohibition against discrimination in "terms and conditions or privileges of employment" would never reach pre-employment conduct. Thus both advertising and hiring decisions were explicitly addressed.

The understanding of the phrase "terms and conditions of employment" in employment law generally is informed by *Hishon v. King & Spalding*. 467 U.S. 69 (1984). In *Hishon* an associate of the law firm asserted that "consideration for partnership" was one of the "terms, conditions, or privileges of employment" as an associate with the firm. Chief Justice Burger, writing for the Court, emphasized that the contractual relationship was central to the scope of Title VII's coverage of the "terms and conditions of employment:"

> Once a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship. In the context of Title VII, the contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace. *The contractual relationship of employment triggers the provision of Title VII governing 'terms, conditions, or privileges of employment.'* . . . Because the underlying employment relationship is contractual, it follows that the 'terms, conditions, or privileges of employment' clearly include benefits that are part of an employment contract."

Hishon, 467 U.S. at 74 (emphasis added). The Court went on to hold that Title VII would apply under the "terms and conditions of

employment" since the firm contracted "to consider her for partnership," id. at 74, and also under the "privileges of employment" since consideration for partnership is viewed as "a benefit that is part and parcel of the employment relationship." Id. at 75. Leading commentators have summarized *Hishon* as holding that "Title VII not only prohibits discrimination in hiring and firing but also makes it unlawful to discriminate against an employee with respect to 'compensation, terms, conditions, or privileges of employment. . . ." Zimmer, Sullivan, and White, Cases and Materials on Employment Discrimination, § C. Employment Terms, Conditions, Privileges of Employment, and Employment Practices 63 (8th Ed. 2013). Clearly, the most widespread use of this phrase in employment law recognizes that "terms and conditions of employment" exist only after contract formation, not before.

The employment contract is also regulated by 42 U.S.C. § 1981 [hereinafter "section 1981"]. Before it was amended in 1991 this section did not reach terms and conditions of employment, but only contract formation. It was necessary to amend the Code to add coverage of terms and conditions of employment precisely because the two concepts do not overlap.

In *Patterson v. McClean Credit,* an African-American woman brought suit under section 1981 for failure to promote, for harassment, and for termination. 491 U.S. 164 (1989). At the time section 1981 stated, in relevant part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts. . . ." *Patterson,* 491 U.S. at 176. Highlighting the dichotomy between contract formation and the terms and conditions of contract the Court explained:

> *[T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established,* including breach of the terms of the contract or imposition of discriminatory working conditions. Such *postformation conduct does not involve the right to make a contract,* but rather implicates the performance of established contract obligations and the conditions of continuing employment, *matters more naturally governed by state contract law and Title VII.*

Id. at 176-77 (emphasis added). The Court rejected the claim of harassment because "the conduct which petitioner labels as actionable racial harassment is postformation conduct by the employer relating to the *terms and conditions* of continuing employment." *Id.* at 179

(emphasis added). In order to make post-formation[1] conduct actionable, the 1991 Civil Rights Act amended section 1981 to provide that "the term 'make and enforce contracts' includes . . . enjoyment of all benefits, privileges, *terms, and conditions of* the contractual relationship." PL 102–166, November 21, 1991, 105 Stat 1071 [hereinafter "1991 Civil Rights Act"] (amending 42 U.S.C. 1981) (emphasis added). Thus, for over thirty years it has been well-understood in this field that prohibiting discrimination in hiring (contract formation) and prohibiting discrimination of terms and conditions of employment are two different and discrete things. *See generally Haskenhoff v. Homeland Energy Solutions, LL.C,* 897 N.W.2d 553, 587 (Iowa 2017) (itemizing what would qualify as a term and condition of employment without mentioning failure to hire).

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[1] Even after the 1991 Civil Rights Act, the Courts have ruled that post-completion conduct does not relate to a term or condition of the contract in question. *See E.g. Youngblood v. Hy-Vee Food Stores, Inc.,* 266 F. 3d 851 (8th Cir. 2001) (Plaintiff was accused of beef jerky-theft after he made the purchase but before he left store. Court dismissed the section 1981 suit because "Once Youngblood paid the cashier and received the beef jerky from the cashier, neither party owed the other any duty . . . . Hy-Vee cannot be said to have deprived Youngblood of the benefit of any contractual relationship, as no such relationship existed when it took the beef jerky away from Youngblood.").

ABI's construction of section 364.3(12) is particularly belied by the history of the bill, HF 295, that created it. As has been pointed out, that bill, as originally proposed, removed from section 216.19 the language reserving to cities the right to enact "any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices." Iowa Code § 216.19(1)(c). The final bill, as amended by H-1107, left Chapter 216 intact. ABI suggests this was done because the legislature wanted to preserve local flexibility in housing, credit, education and public accommodation while taking away this flexibility in employment. How much more straightforward to simply amend section 216.19(1)(c) to say "Nothing in this chapter shall be construed as limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices in housing, public accommodations, education, or credit."

ABI's theory is that rather than such an obvious solution, the legislature chose to leave *all* flexibility in place in section 216.19, and then take some of it back again by using the phrase "providing for terms and conditions of employment" to refer to antidiscrimination laws. But these laws *ban* discriminatory employment actions rather

than *provide for* employment terms. Thus, ABI's explanation of H-1107 is misconceived and unpersuasive. It is much more likely that the legislature left section 216.19 intact because it decided to leave local control over discrimination intact. Indeed, it is clear that in passing section 364.3(12)(a) the legislature intended to preempt laws that do things like "provide for" minimum wages, or "provide for" paid family leave, or "provide for" enhanced overtime pay - in other words laws "providing for terms and conditions of employment." The Waterloo Ordinance simply does not fit this category, and therefore section 364.3(12)(a) does not expressly preempt it.

Finally, care must be taking in reading section 364.3(12). The regulations which fall within its prohibition are those which provide for "terms and conditions of employment." The laws with which those terms and conditions must conform include a "federal or state law relating to . . . hiring practices." The phrase "relating to hiring practices" is a phrase limiting the laws which will be considered preemptive. It does not refer at all to the Ordinance in question. To reach Ordinance 5522, section 364.3(12)(a) would have to say something like: "A city shall not adopt, enforce, or otherwise administer an ordinance, motion, resolution, or amendment *that*

provides for employer hiring practices that exceed or conflict with the requirements of federal or state law that regulate hiring practices." But that is not what the Code says, or anything like that. The Courts are limited to "what the legislature said, rather than what it should or might have said." Iowa R. App. P. 6.904(3)(m). This means that until the Code is amended, only ordinances providing for terms and conditions of employment are addressed. Since pre-employment conduct like advertising, job application, and adverse hiring decisions do not relate to terms and conditions of employment, the regulation of this pre-employment conduct by Ordinance 5522 does not run afoul of section 364.3(12)(a).

E. CONCLUSION: This case comes down to logic. There can be no terms and conditions of what does not exist. The Ordinance regulates conduct occurring *before* the employment contract is formed (namely, drafting applications, publishing advertisements and conducting investigations), and conduct which necessarily prevents the formation or existence of a contract (namely, refusing to hire). Therefore, Ordinance 5522 in no way refers to an extant employment contract, and thus in no way refers to the "terms and conditions of employment." Accordingly, Ordinance 5522 is not in the category of ordinances referred to by section

364.3(12)(a) and constitutes a valid exercise of home rule authority. As stated by the City: "Ordinance No. 5522 is not expressly preempted. ABI's reliance on Iowa Code § 364.3(12) is misplaced." Appellees Br. p. 28. "[T]here is nothing specifically in the statute which prohibits Ordinance No. 5522 and in addition, the Ordinance is expressly authorized by § 219.19(1)(c)." *Id.* at p. 36.

II. Should There Be Any Doubt as to the Construction of Iowa Code section 364.3(12)(a) That Amicus Propose in Part I, the Doctrine of Constitutional Avoidance Counsels the Court to Construe Statutes to Avoid Constitutional Issues When Possible.

The canon of constitutional avoidance is embraced not only by the United States Supreme Court but also by the Iowa Supreme Court, and it provides strong precedent for the proposed construction of section 364.3(12)(a) that, by its express text, its application does not reach the pre-employment conduct regulated by the Waterloo Ordinance. The longstanding canon is a "cardinal principle" of statutory interpretation that applies whenever there is doubt about the constitutionality of a particular reading of the statute. This principle counsels that when there is another reasonable interpretation of a statute that would avoid the constitutional question, the "doctrine of constitutional avoidance counsels us to construe statutes to avoid constitutional issues when

possible." *State v. Dahl*, 874 N.W.2d 348, 351 (Iowa 2016) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (Brandeis, J. concurring)). The Iowa Supreme Court adheres to this rule, with precedent dating back to at least 1967:

> The general rule that all statutes must be so construed as to avoid unconstitutionality if that can reasonably be done is adhered to in this state. Thus where a statute is fairly open to two constructions one of which will render it constitutional and the other unconstitutional or of doubtful constitutionality, the construction by which it may be upheld will be adopted.

State v. Ramos, 149 N.W.2d 862, 865 (Iowa 1967). As the City ably demonstrates, Ordinance 5522 mirrors federal and state anti-discrimination law that bars disparate impact discrimination in employment. But prudential considerations always suggest that a Court not decide a case on constitutional grounds if such a decision is not necessary. The Court could avoid the second component of the preemption question, whether the Waterloo Ordinance exceeds state or federal anti-discrimination law, by its resolution of its first component: that is, by construing section 364.3(12) not to apply to the Waterloo Fair Chance in Employment Ordinance because Ordinance 5522 does not provide for "terms and conditions of employment."

III. The Overwhelming Evidence of the Disparate Racial Impact of Employer Practices that Exclude Persons Who Have a Criminal Record from Consideration Provided a Proper Basis for the City to Exercise Its Authority pursuant to Iowa Code section 216.19 of the Iowa Civil Rights Act to Enact Ordinance 5522.

Assuming *arguendo* the Court were to conclude that section 364.3(12) has application to Ordinance 5522, the final question presented is whether Ordinance 5522 "exceeds federal or state law." The disparate impact theory of discrimination has been established in federal and state law for nearly five decades. *See Griggs v. Duke Power*, 401 U.S. 424 (1971); *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission*, 453 N.W.2d 512 (Iowa 1990) [hereinafter "*Hy-Vee*"]. Quoting from *International Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), this Court in *Hy-Vee* succinctly summarized the disparate impact theory:

> [Disparate impact theory] involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

Hy-Vee, 453 N.W.2d at 516.

ABI's principal argument is that there must be proof "that the employer's hiring practice causes a disparate impact between the

number of '*qualified* persons in the labor market and the persons holding at-issue jobs.' *Wards Cove Packing Co. v. Atonio*, 490 US. 642 650 (1989)." Appellant Br. pp. 16-17 (emphasis added by Appellant).[2] The NAACP submits there is considerable doubt as to whether this holding of *Wards Cove* remains good law because much of *Wards Cove* was overruled by the 1991 Civil Rights Act, including *Wards Cove*'s alteration of the burden of persuasion.[3] With regard to the burden of persuasion on job-relatedness and business necessity, the 1991 Civil Rights Act clearly overruled *Wards Cove* by "unequivocally declar[ing] that the employer's justification to a prima facie case is an affirmative

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[2] ABI also cites dicta in *Canada v. Texas Mut. Ins. Co.*, 766 F. App'x 74 (5th Cir. 2019), and *EEOC v. Freeman*, 961 F. Supp.2d 783 (D. Md. 2013) (aff'd in part sub nom, 778 F.3d 463 (4th Cir. 2015)). *Canada* was litigated pro se, and *Freeman* was significant principally because of its excoriation of the EEOC expert's woefully inadequate statistical analysis. ABI cites no other circuit precedent, and only one district court case.

[3] Section 2 of the 1991 Civil Rights Act provides: "The Congress finds that . . . (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1898) has weakened the scope and effectiveness of Federal civil rights protections . . . ." Section 3 provides: "The purposes of this Act are . . . (2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 . . . ."

defense on which the employer must persuade as well as produce evidence." Harold Lewis, Jr., Civil Rights and Employment Discrimination Law 267 (West 1997). This Court's *Hy-Vee* case summarized *Wards Cove* holdings, but *Hy-Vee* was decided in 1990, so *Hy-Vee* had no occasion to rule on the 1991 Civil Rights Act's modification of *Wards Cove,* nor on what, if any, effect the 1991 Civil Rights Act had on the Iowa Civil Rights Act [hereinafter "ICRA"] law governing disparate impact cases.

For present purposes, the NAACP does not think it is necessary to resolve these uncertainties, as we believe the Waterloo Ordinance should be upheld even were it to be measured against the *Wards Cove* standard advocated by ABI. However, the principal reason for rejecting ABI's argument that Ordinance 5522 must be based on a comparison to employers' "at issue jobs" is the City's wise insight:

> The criteria for a specific plaintiff's discrimination claim against a specific employer, where substantial compensatory damages and attorney's fees could be awarded" may properly require "a comparison of the qualified applicant pool and the employer workforce, as argued by ABI. However, Ordinance No. 5522 is attempting to reduce the discriminatory impact of such criminal history considerations across the entire population of the City. Therefore, the use of broader statistics was a much better way to measure this effect and fulfilled the City's obligation to have a rational basis for the Ordinance.

Appellees Br. p. 49. *Cf. Petro v. Palmer College of Chiropractic*, No. 18-2201, 2020 WL 3524842 (Iowa Sup. Ct. June 30, 2020) (holding municipal home rule stops when city attempts to bring about enforceable legal relations between two private parties, but nonetheless provides local civil rights agency with enforcement authority of local civil rights ordinances).

Nonetheless, we will examine ABI's *Wards Cove* argument, beginning with the entire *Wards Cove* discussion of *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977), and its application to proof of disparate impact:

> It is such a comparison—between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs—that *generally* forms the proper basis for the initial inquiry in a disparate-impact case. Alternatively, in cases where such labor market statistics will be difficult if not impossible to ascertain, we have recognized that certain other statistics—such as measures indicating the racial composition of "otherwise-qualified applicants" for at-issue jobs—are equally probative for this purpose.

Wards Cove, 490 U.S. at 650-51 (emphasis added). ABI quoted only a portion of the first sentence, omitting the "generally" qualifier and the exception provided in the second sentence. Appellant Br. pp. 16-17. Two pages later, the Court clarified that the general rule applied only "*[a]s*

long as there are no barriers or practices deterring qualified nonwhites from applying for noncannery positions. . . ." *Wards Cove*, 490 U.S. at 653 (emphasis added).

In *Hy-Vee*, this Court addressed this very issue. Justice Lavorato, writing for a unanimous Court, held:

> If the employer's practices deter or create barriers to the members of the protected class, however, "the [statistical] analysis would be different." . . . [*Wards Cove*] does not specify what that analysis would be. But the implication of the Court's statement seems to be that internal work force comparisons would then apply. This is so because the employer's deterrence skews the proper comparison.

453 N.W.2d at 519 (citation omitted). The Court found, the *Wards Cove* exception was applicable and allowed proof of disparate impact by other statistical proof:

> [Plaintiff] Blood did use internal work force comparisons to establish the causal link between the discriminatory practice and the disparate impact. Although the Supreme Court generally disapproved of such a comparison in *Wards*, we think the comparison is nevertheless proper here. Hy–Vee was explicitly discriminatory by the segregation, giving its women employees the clear message that they would never be considered to have the proper stocking experience necessary for promotion. Hy–Vee also had in effect a policy statement outlining the reasons for not promoting women. So Hy–Vee was deterring its women employees from applying for promotions. *As the Court said in Wards, the analysis must be different when the employer's barriers are deterring potential applicants of a suspect class.*

Id. at 521-22 (emphasis added).

The *Wards Cove/Hy-Vee* exception has clear application to the conduct regulated by Ordinance 5522. For those employers that refuse to consider job applicants who have a criminal record, examining these employers' actual applicant data will never demonstrate the true impact of such discriminatory policies, especially the adverse racial impact on persons of color. The reason for that is that persons with convictions believe they will not be considered and do not apply for jobs with employers who have such policies. To use the words of the *Hazelwood* case, the precedent that *Wards Cove* quoted, applicant flow statistics are the best bases for comparison unless, by virtue of the employer's discriminatory reputation, applicants of the impacted group do not apply for such jobs. 433 U.S. 299. Indeed, *Int'l Brotherhood of Teamsters v. United States* held that the most racially discriminatory system of all is one in which persons of color do not even apply for the job because they know, due to the employer's reputation for discrimination, it is futile to do so.[4] 431 U.S. 324, 365-367 (1977).

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[4] *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365-367 (1977), held:

An internal workforce comparison, as this Court upheld in *Hy-Vee*, works well when the at-issue jobs are promotions. It of course does not work in the context of Ordinance 5522 which deals solely with pre-employment conduct, and persons applying for employment. A review of the *Hazelwood* and *Teamsters* cases is instructive regarding proof of disparate impact in the context of persons seeking to be hired, the conduct regulated by Waterloo Ordinance 5522. Both *Teamsters* and *Hazelwood* were pattern and practice cases alleging racial

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> A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices, by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

discrimination excluding African Americans from being hired for over-the-road truck driver jobs and teacher jobs, respectively. *Hazelwood* was decided a few months after *Teamsters*, and its summary of the statistical evidence required in such cases continues to be good law:

> In *Teamsters*, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general areawide population was highly probative, because the job skill there involved—the ability to drive a truck—is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparison to the general population (rather than to the small group of individuals who possess the necessary qualification) may have little probative value.

Hazelwood, 433 U.S. at 308 n.13. Thus, *Hazelwood* held that the statistical evidence had properly compared the African American percentage of the qualified applicant pool for teacher jobs with the African American percentage of teachers hired by *Hazelwood*.

Assuming *arguendo* the *Wards Cove*, *Hazelwood*, *Teamsters*, and *Hy-Vee* line of cases has application to the City's legislative acts, this caselaw is instructive on two key points for the resolution of the instant case. First, the Ordinance need not be based on statistical data comparing "qualified persons in the labor market and the persons holding at-issue jobs data" because the *Wards Cove* exception invoked in *Hy-Vee* applies. Again, the reason the exception applies is that

employers that exclude applicants based on criminal history are well known within a community, and their reputations have deterred persons with criminal records, including arrests, from even applying for jobs. For those who may be unaware of an employer's practice and still request an application, many will stop as soon as they see "the box" on the application form asking about a criminal record. Second, although there will undoubtedly be a few exceptions, most persons coming out of prison and criminal supervision will be looking for entry-level jobs. Most of the jobs to which they will be applying will not have significant educational or other skill qualification requirements. For such jobs, *Teamsters* and *Hazelwood* teach that general population data can reliably be used to prove disparate impact, and the evidentiary showing that was made in support of Ordinance 5522 more than satisfied that threshold showing. General population data was upheld as a sufficient basis of statistical comparison in *Teamsters* for those seeking truck driver jobs, even though over-the-road truck drivers need to have a commercial driver's license.[5]

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[5]The NAACP is aware that this Court's most recent disparate impact case, *Pippen v. State*, 854 N.W.2d 1 (Iowa 2014), revolved around whether plaintiffs were excused from having to identify the particular employment practice that was causing adverse racial impact because the discriminatory practices were not capable of separation. ABI

The City's Brief set out the extensive federal authority recognizing the severe racial impact of using arrests or convictions to make employment decisions. We will supplement its showing with Iowa authority. While the Iowa Civil Rights Commission has no regulations addressing race discrimination in employment, nor any such publications, Iowa Workforce Development has provided guidance which is very similar to that of the EEOC:

> [A]n employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on minority populations. The EEOC has found that an employer may exclude an individual from employment on the basis of a conviction record only if the employer's decision was "justified by business necessity."

Successfully Interviewing Guide, p. 8 (Iowa Workforce Development 2011) available at: https://www.iowaworkforcedevelopment.gov/sites/search.iowaworkforcedevelopment.gov/files/Successful%20

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makes no contention that the Ordinance does not identify the particular employment practice(s) that cause the disparate impact, nor could it. The Ordinance very carefully identifies both objective and subjective employment practices based on criminal records that have caused a substantial adverse racial impact on persons of color, especially African Americans, across the nation, including the State of Iowa and the City of Waterloo. The majority and dissenting opinion in *Pippen* expressed disagreement as to whether the ICRA, which contains no language imposing such a particularity requirement, should be construed to require such a showing. That issue is not presented in this case.

Interviewing%20Guide70-0006.pdf. On arrests Iowa is also emphatic[6]:

> Because members of some minority groups are arrested substantially more than whites in proportion to their numbers in the population, making employment decisions on the basis of arrest records involving no subsequent convictions has an adverse impact on the employment opportunities of those groups. Thus, such records alone cannot be used to routinely exclude persons from employment.

Id. at pp. 7-8. Naturally, an employer may have a more nuanced approach to the use of conviction records which may, in the particular case, ameliorate the disparate effect. The Ordinance, however, can be interpreted to avoid any conflict caused by applying it to such policies simply by reading the Ordinance's use of "based on" and "based solely on" as meaning that it does not cover partial reliance on conviction or arrest records when such partial reliance does not have a disparate impact. Read with an eye to preserving both the Ordinance and section

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[6] Both Iowa and EEOC allow the employer to consider information that the applicant actually did the act leading to arrest, if that consideration is consistent with the employer's business interests. But the arrest itself is not to be considered. The Ordinance outlaws only basing a hiring decision "solely" on arrest records, and so is completely consistent with this *provisio*.

364.3(12), the Ordinance does not conflict or exceed federal or state laws outlawing race discrimination in hiring.

In passing Ordinance 5522 the City of Waterloo exercised the authority expressly delegated to it by the ICRA. The City is correct when it asserts the Ordinance does not represent a broadening or extension of existing federal and state anti-discrimination law, but rather "mirrors" current disparate impact law. If this Court does conclude Ordinance 5522 represents a broadening or extension of the ICRA, the NAACP respectfully submits "this variation between local law and state statute falls within the regulatory latitude the legislature bestowed on cities in section 216.19 to enact ordinances that prohibit 'broader or different categories of unfair or discriminatory practices.'" *Baker v. City of Iowa City*, 750 N.W.2d 93, 102 (Iowa 2008).

CONCLUSION

For all of the foregoing reasons, Amicus NAACP respectfully submits that this Court should affirm the District Court's Order denying ABI's Motion for Summary Judgment and granting the City's Motion for Summary Judgment.

Respectfully submitted,

/s/ Russell E. Lovell, II

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/s/ David S. Walker

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CERTIFICATE OF FILING/PROOF OF SERVICE

The undersigned hereby certifies that on July 8, 2020, I served this document, Brief of Amicus Curiae NAACP, by EDMS to all parties electronically.

/s/ Russell E. Lovell, II

RUSSELL E. LOVELL, II

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,995 words, excluding the parts exempted by that rule.

This brief complies with the typeface requirements of Iowa R. App. P.6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using 14-point Georgia.

RULE 6.906(4)(d) CERTIFICATE OF COMPLIANCE

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned states: Members of the Legal Redress Committees of the Des Moines and Iowa-Nebraska NAACP authored this brief in whole without contribution from any party's counsel. No funding was received

by any person or organization, as all counsel on the legal redress committee worked pro bono for the NAACP.

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